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No. 87-1000

IN THE
SUPREME COURT OF THE UNITED STATES

November Term, 1987

MARGARET WATTAWA,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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ARGUMENT

THE PETITIONER'S CLAIM THAT THE PARTY-TO-A-CRIME INSTRUCTION VIOLATED HER RIGHT TO A UNANIMOUS JURY VERDICT DOES NOT PRESENT A FEDERAL CONSTITUTIONAL QUESTION.

The petitioner contends she was denied a unanimous jury verdict by the

trial court's instruction (Wis. JI-Criminal 400)--theft as a party to a crime. The petitioner argues the instruction allowed for some jurors to conclude she was a principal and others to conclude she was a party to a crime, without a unanimous verdict on her actual participation.

The magistrate for the eastern district of Wisconsin reviewed these claims and held that no federal constitutional claim was presented (see petitioner's appendix at 110-11). Nevertheless, the magistrate addressed the merits of the arguments and was not persuaded by them (see petitioner's appendix at 111-16). The United States District Court for the Eastern District of Wisconsin agreed with the magistrate's recommendation (see petitioner's appendix

at 104-06). On appeal, the United States Court of Appeals for the Seventh Circuit adopted the district court's order as its own (see petitioner's appendix at 102-03). This case is now in the United States Supreme Court on a petition for a writ of certiorari even though no federal question has ever been raised in the lower courts.

Certiorari lies in any case in which some federal right or interest has been drawn in question in the highest state court in which a decision can be had.

The sixth amendment guarantee requiring a unanimous verdict in a federal jury trial does not require that the jury's vote in a state criminal proceeding be unanimous. Apodaca v. Oregon, 406 U.S. 404, 406, 410-12 (1972); Johnson v. Louisiana, 406 U.S. 356, 359 (1972). Thus, the petition does not

raise a federal constitutional claim which can form the basis for issuance of a writ of certiorari. The contention that the instruction given by the trial court violated the Wisconsin Constitution also fails because, even if there is such a right under the Wisconsin Constitution, an instruction which violates the state constitution breaks state law only. It does not present a federal claim.

Finally, the petitioner appears to allege that her fourteenth amendment due process rights were violated by the party to a crime jury instruction. But this case was briefed in the lower courts on the sixth amendment unanimity requirement, not on a due process theory. Since due process was not addressed by those courts, it should not form the basis for review by this court.

Since no federal question has been presented for review, and since the issue has been properly decided on its merits, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons shown, the petition should be denied.

Respectfully submitted,

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